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Costa Rica:
Introduction of Direct Democracy
Procedures

Carlos D. ANGULO RUIZ

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ABSTRACT

As two Acts on direct democracy procedures at the national level were passed only earlier this year (2006), citizens have not yet had time to truly apprehend the extraordinary change in their political rights. Additionally, the government has made no effort to adequately inform the people of these powerful instruments they may now recur to, to make their voices heard. The fact that these instruments have not yet been tested, either at the lower municipal level or the national level, makes it difficult to assess their appropriateness. Notwithstanding, certain organized groups have already made official their intention to collect signatures, in order to petition a referendum on whether to ratify the Free Trade Agreement signed two years ago with the United States of America.

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1. Introduction

Costa Rica is, without doubt, known and respected worldwide for its longstanding democratic tradition. This has astonished many international analysts, given the convulsed geopolitical context in which this relatively small nation has developed.¹ Not surprisingly, this consolidated democratic political stability has earned Costa Rica the international nickname of “the Switzerland of Central America”. There was, nevertheless, one important aspect in which Costa Rica, until very recently, trailed far behind its Helvetic paragon, it lacked the multiple and perfected instruments of direct democracy that Switzerland is envied for: the Referendum and the *Iniciativa Popular*.

However, Costa Rica caught up just a few years ago when it finally adopted and implemented these valuable instruments of modern democracy in its legal and constitutional framework. Both the Referendum and the *Iniciativa Popular* are now available to Costa Rican citizens as part of their democratic political rights arsenal, but, because of their novelty, they have not yet been tested. This is true both at the national and the municipal level, even though these instruments have existed at the lower local government level for almost a decade now. The *Iniciativa Popular*, in Costa Rica, is a democratic mechanism through which a minimum 5% of the Costa Rican citizenry can initiate the law-making process and present a draft Bill for adoption of a new law, an amendment to an existing statute, or a constitutional reform which will later be voted on before it becomes official. The Referendum, in turn, is a vote by the People on a legal or constitutional text to approve or improve. In Costa Rica the result of a referendum is binding, if a “quorum” threshold of valid registered voters is attained.

In the following pages, we intend to follow the evolution of Costa Rican democracy, from a closed representative democracy to a much more open, modern democratic regime; one that allows for greater public involvement that gives it legitimacy. We will then highlight the main characteristics of institutional public participation mechanisms in Costa Rica and both critically assess the introduced instruments and speculate on their immediate possible uses in the light of Costa Rican social and political reality. Finally, we will briefly address the related question of so called e-democracy in Costa Rica. A short conclusion will present our final thoughts.

2. Historic Evolution of Costa Rican Democracy

As mentioned in the introduction, direct democracy instruments are nowadays a complementary part of the Costa Rican legal and political representative system. This is the product of a historical process that has led to a democratic maturity of the Costa Rican citizenship.

The Longing for Participative Democracy.

¹ Auditoría Ciudadana, pg. 42.

For the XXI Century Costa Rican citizen, the concept of democracy has little to do with classic Hellenic protodemocracy. The current civic context covers a much broader and diffuse concept which includes many and varied aspects to take into account. This no longer refers simply to the existence of clean and regularly held elections of representatives, but further considers, as equally essential components of modern democracy, civil rights protection, transparent and public interest led institutions, and accountability of the elected public servants.²

Other basic democracy essentials, from the Costa Rican citizen's perspective, include equality of conditions, treatment and opportunities, all of which have been dominant ingredients in our Nation's history, characterized by a first world standard of education and a prominent, although diluting, middle class. For Costa Ricans, however, the most important element arising from democracy is the expressed desire to actively participate in political affairs which, in the past decade, was called by some authors as a "yearning for participative democracy", as opposed to being restricted to a representative democracy.

Today, we may state without doubt that this yearning for participative democracy has been assuaged as Costa Rica has gone, in a decade, from being a purely representative democracy to becoming a hybrid one that incorporates several direct democracy instruments. Citizens can now enjoy different mechanisms that allow, from the lowest (or more accurately, closest) district level to the highest constitutional level, for their participation in their Country's direction.

Costa Rican Democracy of the Second Republic.

It is not within the scope of this paper to completely retrace the history of Costa Rican democratic evolution, but most authors agree that Costa Rica did not become a true and complete working democracy until 1949. In 1948, Costa Rica had just experienced a Civil War provoked by fraudulent elections wherein the government, then in charge of both electoral procedures and administration, manipulated the results in favour of the governing republican-communist Coalition's candidate. The opposing "National Liberation" movement eventually overthrew the illegitimate new Government (whose followers were exiled) and proclaimed the Second Republic.

The exceptional feature of this historic event was that the military National Liberation movement, led by "Pepe" Figueres, chose not to exercise this power obtained by *coup d'Etat*, but instead abolished the army, summoned a national assembly of recognized intellectuals to draft a new Constitution, convened new elections and soon enough handed over the government to the new and now legitimately elected President.

This may truly be taken as the turning point in the page of modern Costa Rica's democratic history, for the newly drafted Constitution which emerged from that National Assembly in 1949 was a well balanced document. They based it on the previous 1872 Constitution and, while renovating the government structure and game of powers, incorporated new and important institutions, including the independent

² Rodríguez, Florisabel, Seminario Ciudadanía Restringida: Valores democráticos y apoyo hacia el sistema político en Centroamérica, Procesos, INCAE, Alajuela 2006.

Electoral Tribunal, the “Fourth Power” of Costa Rica, with exclusive jurisdiction over all electoral law matters.

And so, from 1949, Costa Rican constitutional democracy's main features are: a paternalist presidential political regime; a unicameral blocked-list elected parliament; a strong and totally independent Judicial Power; a centralized administration, territory-wise, but with several autonomous institutions *ratione materiae*; and foremost, no military. In 1975, the full democratic transition was attained when the last restriction to electoral participation, which forbade communist parties, was cleared so enabling any political party to run for office, despite its ideology.

The Aborted Introduction of Public Consultations in 1949.

Back in 1949, after the creation of the Second Republic in Costa Rica, the first attempt to incorporate a public participation mechanism in the form of a large spectrum referendum was aborted. The National Convened Constituting Assembly, comprised of many eminent and scholarly lawyers who had completed their studies abroad, specifically described a direct citizen consultation for any Constitutional amendment bill.³ The already instituted referendum in the Constitution of another Latin American Nation, Uruguay, became one of many sources of inspiration for such a mechanism of public participation. The proposed provision stated that the referendum would be held at the same time as the next scheduled national elections. However, although this proposal was endorsed by the Governing Council, it never made it into the final adopted Constitution. Only the *Plebiscite* was retained as a mandatory consultation device, but with a territorial scope limited to the creation of new provinces.

Practical considerations were put forward as the justification for leaving such a consultation out, but it was mainly the ruling class's lack of trust in the people's ability to comprehend the delicate task of adopting or rejecting Constitutional provisions that ultimately prevented the referendum from entering the Constitution. This failure to hand the sovereign power back to the people was due, according to the National Assembly members themselves, to the fear that the people would not make good use of such instruments, given their poor cultural and educational levels at that time.

One of the Assembly members, while regretting this decision, pointed out that the referendum proposal “has a deep democratic meaning, since it gives the People the opportunity to directly relate to a constitutional amendment. However, although this system is good in theory, it might not work in a Country such as ours, in which we are not used to the referendum system, a system that has been established by many countries. For us, it would be too troublesome to carry out consultations to resolve this or that issue.”⁴ It would be more than fifty years of delegated democracy before such a mechanism of direct public participation was finally introduced into the Constitution

Introduction of a Mandatory National Plebiscite on New Provinces

³ Section 274 of the Draft Political Constitution of 1949, presented by the National Constituting Assembly. Referred by Ubico, Carlos, op. cit. pg. 111.

⁴ Quote original from Volio Sancho, in Ibid.

One important provision, nonetheless, made its way into the original 1949 Constitution. It established a mandatory direct consultation to citizens in Provinces to be severed for creating new territorial circumscriptions.

Costa Rica's political territory is divided into seven Provinces, which are in turn composed of Cantons, with each Canton having a local government or *Municipalidad*. Parliament may create new provinces, according to Article 168 of the Costa Rican Constitution, provided it has previously received an affirmative vote to the projected law from the affected provinces⁵. The oldest and more natural instrument for direct consultation and, in Costa Rica, bears a special meaning is, perhaps, the Plebiscite. It was through a Plebiscite that Nicoyans freely chose to belong to Costa Rica instead of Nicaragua. Nicoya, in the northern Pacific region of the country which is now part of the Guanacaste province, was annexed to Costa Rica by way of a public consultation held in the late nineteenth Century. However, the scope of this instrument in our Constitution is restricted to territorial restructuring and, to date, has never been implemented; although there have been some initiatives to create new provinces in recent years, none of which has really found an echo in Parliament.

Two things are worth noting though: the first is that neither a law nor any other type of regulations have been enacted to address the basic conditions on how such a Plebiscite would be implemented, nor are there any quorum nor participation thresholds set to validate such a Plebiscite. The Constitutional Court, however, has stated that the Plebiscite is an unavoidable previous step for any legislative bill which aims to create a new province. The second is that local authorities have identified that the constitutional Plebiscite is in fact a restricted referendum, as the text of the constitutional provision states that the people will vote on a proposed bill of law, and not on whether they would agree to the creation of a province *in abstracto*.

The Need for a Democratic Makeover.

The Constitution of 1949 is the one still in force in Costa Rica, almost 60 years after it was adopted, evidence both of its wide acceptance and the quality of its intellectual contents. From that moment on, one can assert that Costa Rica has led a sound democratic life incorporating political alternation in clean and unchallenged elections which take place every four years to elect the People's representatives.⁶

⁵ Art. 168.2 of the Costa Rican Constitution reads: "*La Asamblea Legislativa podrá decretar, observando los trámites de reforma parcial a esta Constitución, la creación de nuevas provincias, siempre que el proyecto respectivo fuera aprobado de previo en un plebiscito que la Asamblea ordenará celebrar en la provincia o provincias que soporten la desmembración.*"

⁶ Estado de la Nación, Auditoría ciudadana, pg. 42: "*Diversos factores, asentados poco antes y durante este período, contribuyeron al afianzamiento de la estabilidad democrática; entre ellos cabe mencionar los siguientes: la abolición del ejército como institución permanente en 1949, que eliminó del escenario a una fuerza que en casi todos los países de América Latina generó inestabilidad política; el desarrollo de un Estado social de derecho, que fortaleció el respeto y la protección de los derechos ciudadanos y la sujeción, en la práctica, del poder político a la Constitución y las leyes; la depuración de un sistema electoral independiente de los otros poderes del Estado y capaz de garantizar elecciones limpias, libres y competitivas; y*

However, as the twenty first Century approached, this paradigm exhibited its first signs of weariness; political apathy and nonconformity began to take over the population and, with an ever increasing non-participation, this discontent spread down to new generations. Many Costa Ricans had appeared to have lost faith in their appointees, although they clearly supported democracy and its institutions. Much of this despondency had been caused, in part, by a combination of events: the Central American refugee immigration wave that exceeded the Costa Rican social capacity in the 1980s; the lethargy of its economy; and a few major corruption scandals that had rocked the foundations of political integrity.

The time had come to rethink the political system and give some sovereignty back to its rightful and legitimate holder: the People.

3. Introduction of Direct Democracy Procedures

In the last few years Costa Rican democratic evolution has been given a qualitative leap by having new mechanisms introduced which allow greater citizen participation in public affairs at all levels of government.

The Players

Even before the very recent major reforms to the Costa Rican democratic legal framework took place, some actors had already begun playing an important role in aiding to perfect Costa Rican democracy, and had even started to make headway to enable citizens an increased participation in political decision making. We refer to a varied number of institutions, entities and individuals, both from the private and public sectors. Among the first group are: universities; students and scholars; economic interest groups; lobbies; chambers of commerce; labour syndicates and unions; and even political parties.

At the public level, such contribution to Costa Rican democracy found a source in a few Institutions. These are: the Constitutional Chamber of the Supreme Court of Justice; the Citizen Ombudsman (*Defensoría de los Habitantes*); and the *Oficina de Iniciativa Popular of Parliament*; of which we shall speak *ut infra*. However, it is the *Tribunal Supremo de Elecciones*, or Electoral Tribunal, who has had, from its creation, the most prominent institutional role in making Costa Rica a true “*Estado social y democrático de derecho*” (Social and Democratic Rule-of-Law State). The Electoral Tribunal is also the key player in the new Direct Democratic game.

el rápido progreso económico y social del país, que mejoró las condiciones de vida de la mayoría de la población.”

The Electoral Tribunal was created in the 1949 Constitution. It is an independent body with the restricted but exclusive power and jurisdiction in all matters related to voting and elections. In Article 99 of the Constitution, it states that the Electoral Tribunal is in charge of the organization, direction and supervision of all electoral activities. According to Article 9 of the Constitution, the Electoral Tribunal is an additional fourth State Power that completes the classic division of Powers doctrine triad that our countries have inherited from Montesquieu. As a corollary to this independency, only the Electoral Tribunal can interpret the constitutional provisions relating to political rights and “electoral matters”. It has been granted exclusive jurisdiction over political and electoral rights violations and consequently, it is before the Electoral Tribunal that an affected citizen must seek remedy by filing an “*Amparo Electoral*” action, thus excluding common jurisdiction of all common ordinary courts and even the Constitutional Chamber.⁷

It can be seen that the new legal framework of democratic participation further entrusts the Electoral Tribunal with the whole referendum procedure including the scrutiny and final result declaration, and assigns to it the compliance review of signatures collected and other preliminary stage requirements of the *iniciativa popular*.

The Procedure Leading to the 2003 Reform

The loss of trust in political leaders became apparent by the end of the last decade, as participation in national elections decreased to such an extent that new records of discontent were attained among the population. A political episode, which took place in 1999, further encouraged the need for political reform. In that year, a direct confrontation occurred between the new government and some major left-wing interest groups on the subject of economic policy reforms; specifically, a project to privatize a State Monopoly on Electricity supply and Telecommunications. This ended in numerous and sizeable protests and also blockages of major access roads, that were mainly organized by unions and students.

⁷ Brenes, Luis Diego, Rivera, Juan Luis, *Recurso de Amparo Electoral*, in *Revista de Derecho Electoral*, nº1, 2006, “*A fortiori, la jurisprudencia constitucional nacional, tanto aquella que emana de la Sala Constitucional como la propia del Tribunal Supremo de Elecciones, han dejado claro que, como máxima autoridad jurisdiccional en la materia electoral, el Tribunal Supremo de Elecciones es un órgano especializado, que por su naturaleza y competencias, está llamado a ser un auténtico Tribunal Constitucional, de suerte tal que, necesariamente, quebranta el principio de universalidad y unidad del Poder Judicial en la resolución de conflictos jurisdiccionales; y, además, tiende a exceptuar el control concentrado de constitucionalidad en manos de la Sala Constitucional. Así las cosas, este acuerdo jurisprudencial que considera al Tribunal Supremo de Elecciones como un tribunal constitucional especializado, es el que a su vez sustenta el pleno desarrollo por parte del órgano electoral de institutos propios y característicos de una jurisdicción constitucional ordinaria, caso del recurso de amparo electoral y de la desaplicación de normas estatutarias por inconstitucionales a la luz de un caso concreto.*”

Unsurprisingly, it was the then opposition social-democrat party, *Liberación Nacional*, and in particular some of its far-left members, who promoted the introduction into the Constitution of the new direct democratic procedures, referendum and *iniciativa popular*.

The process did not take very long to accomplish, given that they found little opposition from other political parties. Nonetheless, they encountered some caveats and scepticism among certain government officials and even from the Country's intellectual elite. Certain well-known columnists and political experts severely distrusted the transition from a well established partisan representative democratic system to the one of "dangerous participative democracy". Their concern was that people could be easily manipulated by powerful interest groups⁸; such as the public sector labour unions. These unions have demonstrated, with unjustified strikes and street protests, their unlawful strength to manipulate public opinion and bring down important projects for the country. Those unfavourable voices were in the minority, however, for the nascence of new democratic rights and instruments was welcomed overall by the vast majority of parties represented in Parliament.

The Recent Introduction of Direct Democracy Instruments

In 2003, the rather discrete and smooth political process culminated with the amendment of several provisions to the Costa Rican Constitution, which introduced some highly relevant changes to our democratic system. The Iniciativa Popular and the Referendum, both for constitutional and legislative bills, were introduced on a national scale. These instruments, together with the already existing (but limited in scope) Plebiscite, completed the Direct Democracy constitutional framework of Costa Rica.

It took the Parlamento three years to legislate on these instruments to effectively make them available to the citizens.⁹ It wasn't until April 2006, that the two Statutes

⁸ See, for instance, Claudio Gutierrez's opinion article in "La Nación", March 3, 2002, where he says: " *trocar la democracia representativa, que tanto ha contribuido históricamente a la salud política de Costa Rica, por una "democracia participativa" en que directivos de grupos de intereses "ningún electo por el pueblo" se arrogan el poder, sería peor que trocar la primogenitura por un plato de lentejas*".

⁹ An interesting anecdote legally speaking is that the 2003 constitutional reform contained a transitory provision in the form of a direct mandate to the Asamblea Legislativa to approve the laws that would implement the new mechanisms of referendum and iniciativa popular. However, the Parliament did not comply with this constitutional mandate in the established term, which caused the Citizen's Ombudsman to complain before the Constitutional Chamber of the Supreme Court, who indeed scolded the law-makers and requested they immediately adopt both statutes. Newspapers reported this unprecedented vote like this: "*La Sala Constitucional declaró ayer con lugar y en forma unánime, la acción de inconstitucionalidad interpuesta por el Defensor de los Habitantes, José Manuel Echandi y Gabriel Bonilla Picado, para que la Asamblea Legislativa dicte las leyes que regulen el referéndum y la iniciativa popular. Lo anterior implica que la ciudadanía recupera la posibilidad de promover u oponerse a diversas iniciativas legislativas, aprobándolas o improbandolas, así como el ejercicio del control sobre la actividad de los diputados. Se trata de una sentencia histórica que se dicta en forma rápida luego de la audiencia pública (vista) efectuada el 21 de abril.*" (Al Día).

were approved to regulate and implement the newly adopted Iniciativa Popular and Referendum: these are the Law on Referendum and the Law on Iniciativa Popular.

However, back in 1998, the refunded Municipal Code had already introduced the referendum and plebiscite at the local –municipal- level, as well as at the communal or district levels. According to the Municipal Code provisions, the Municipalities, which are the Cantonal local governments, must allow and “foment the active, informed and democratic participation of the people in local government decisions”, for which participation will first be made possible through the instruments of the referendum and the plebiscite, including the “recall plebiscite”.

4. Direct Democracy Instruments in the Costa Rican Legal System

Consultation of the People at the Municipal Level

The Principle of Active Citizen Participation

Although Costa Rica remains a centralized State, with strong concentration of power at the national government level, the Constitution stipulates in article 170 that municipal corporations enjoy autonomy and thus the government will transfer certain attributions. In this particular context, citizen participation in such important matters as, for instance, land and zoning regulations, commercial and liquor expenditure permits, or concession of State owned beaches, to name a few is without doubt to be promoted. The recently adopted Municipal Code does provide for such public participation, both with the referendum adjunction and the plebiscite, on local regulations and affairs respectively. State of the Nation accurately states that “the new municipal code approved in 1998, establishes the principle of active citizen participation promotion (particularly with) the strengthening of Popular consultations; however, the practical implementation of these provisions is low”.¹⁰

In article 5, the Code provides for a clear and explicit legal mandate addressed to the *Municipalidades* for promoting “active, conscious and democratic participation by the people in the local government’s decisions”¹¹. The norm is further developed in article 13, wherein the municipal governing body, the *Concejo*, is given the competency to decide the organization of referenda.¹² Each *Concejo* must adopt an

¹⁰ Auditoría Ciudadana sobre la calidad de la democracia, Costa Rica, 2001, pg. 49.

¹¹ Municipal Code of 1998, Law number 7794, art. 5: “*Las municipalidades fomentarán la participación activa, consciente y democrática del pueblo en las decisiones del gobierno local.*”.

¹² Art. 13, letter j) Municipal Code states: “*Son atribuciones del Concejo: (...) j) Acordar la celebración de plebiscitos, referendos y cabildos de conformidad con el reglamento que se elaborará con el asesoramiento del Tribunal Supremo de Elecciones, observando, en cuanto a la forma e implementación de estas consultas populares, lo preceptuado por la legislación electoral vigente. En la celebración de los plebiscitos, referendos y cabildos que realicen las municipalidades, deberán estar presentes los delegados que designe el Tribunal Supremo de Elecciones, quienes darán fe de que se cumplieron los requisitos formales exigidos en el código y el reglamento supraindicado. Los delegados del Tribunal supervisarán el desarrollo*

ordinance for regulating the holding of referenda, particularly in its form aspects and implementation, for which the rules must be compatible with and observe the legislation in force. Presumably, this last requirement referred to the electoral code, revised just a few months before the municipal code itself, and also to the regulation adopted by the Electoral Tribunal in the form of a so called Handbook, the “*Manual para la realización de consultas populares a nivel cantonal y distrital*”, of October 1998.

The Handbook on “Consultas Populares”

This Handbook supposedly serves as a guide for *Concejos* all around the Country, and provides model provisions and useful definitions which the municipal body may choose to incorporate in their regulations. However, the truth is that this Handbook is not merely a procedure guidebook but it in fact also contains many interesting substantive provisions. The Handbook introduces a new concept which is not in the municipal code. The *consulta popular* or consulting the people, by which the *Municipalidad* may request citizens’ opinions on any actual issue of interest to the population, within the attributions and jurisdiction of the *Municipalidad*.¹³ This consultation is defined in a general way as the mechanism by which the *Municipalidad* submits a particular issue for the people to consider, for obtaining their opinion;¹⁴ and so includes the plebiscite and the referendum. The referendum, consequently, is a more specific instrument, the definition of which is “the consultation by which the object is the approval, modification or derogation of a municipal regulation or provision of legal nature”¹⁵. The referendum is clearly understood in its technical meaning, of a vote relating to a norm, a general rule, and not to specific decisions or other activity.

This Electoral Tribunal provided Handbook constitutes the real basis and essential legal source through which direct democracy is implemented at the lower local level, by setting down a complete system of not only procedural effects, but also, most importantly, of unavoidable substantive provisions. For instance, the Handbook sets a two year reiteration prohibition, stating that the *Concejo* may not re-consult the people on any issue previously voted on and rejected. It is in this Handbook that we find the rule on the legal effects of a referendum; its results are binding for the *Concejo*. The Handbook answers many other equally important questions. For instance, that only Costa Rican citizens who are registered as voters in the electoral list for that *Cantón* may exercise their vote in consultations (article 3.1). It also establishes the *Concejo*’s duty to publicize the referendum properly and correctly, and allow for an adequate discussion of the issues at stake, and to regulate the permitted “propaganda”. Yet another substantive rule is how to draft the subject question for consultation. Article 3.7 indicates that the plebiscite or the referendum subject question must be drafted in a clear and concise manner, so as to avoid confused, captious or ambiguous interpretations; and that the consulted person can only answer with a simple “yes” or a “no”.

correcto de los procesos citados”.

¹³ Handbook, art. 2.2.

¹⁴ Ibid. Art. 2.1.1.

¹⁵ Ibid. Art. 2.1.3.

Uncertain issues

It is not possible to assess in practice the suitability of these instruments and their particular regulations; for to date, more than eight years after their introduction, very few Cantons have adopted them and none has yet used consultation procedures, as far as we know, except for a couple of plebiscites convened for the creation of new districts. From the purely legal standpoint, some questions remain, however. What happens, one may ask, if the *Municipalidad* does not adopt the required regulation to incorporate the Handbook's provisions? Our first assessment is that this would amount to a violation of the citizenry's constitutional political rights, not by commission but by an omission to enact the obligatory regulation. It is our opinion that the Handbook is not directly applicable or "self-executing" to any *Municipalidad*, albeit the imperativeness of its speech. However, it is probable that a *Municipalidad* would nevertheless apply those rules by default, although without a proper legal basis for the reasons mentioned. On the other hand, having said this, we consider, that a *Municipalidad* is entitled to regulate these participation instruments as it chooses, as part of its autonomy, even if this means straying from the Handbook; provided they adopt rules that grant a greater extent of rights to the people, but not if they further restrict their use. By this we mean that a *Municipalidad* may decide it will accord voting rights to not only registered voters, but also to all residents of legal age, and, arguably, even to foreigners. Of course, this rests upon a purely hypothetical scenario.

Another example, not explicitly included in the Municipal Code or the Handbook, of what we consider could be adapted as part of municipal direct democracy regulations would be the possibility for the people to solicit a referendum. This could be easily and legally achieved by regulating the conditions and requirements, making analogical use of constitutional provisions which allow a relatively low percentage of citizens (5% at the national level) to demand the holding of a binding referendum. In fact, we consider that this is a constitutional right which, since its introduction at the national level in 2003, may not be overlooked by local governments.

A final question may be addressed here: In the event of a legal gap in either the municipal regulation or in the Handbook, will it be possible to apply the rules set forth in the new Law on Referendum? To us the answer must be in the affirmative. It is uncertain, however, if the opposite solution, to integrate and construct the national Law with these other legal documents or with municipal practice, will be valid; i.e. if it is possible to use the Handbook rules to organize the national scale referendum if no similar provision is provided in the law or the Constitution.

The Referendum on Laws and Constitutional Amendments

Delegated Sovereignty

The referendum is a true expression of sovereignty, understood in the classic sense as the power belonging to the citizenry to direct their destiny. By means of a referendum, all citizens who have attained majority can exert their right to vote either in favour or against a consulted legal norm. The range could vary from a mere opinion poll, to an act of sovereignty binding on all Authorities. The results of such

voting could also vary, depending on elements such as the issue in question, the level of participation and the rules which regulate the instrument. Most importantly, and regardless of the legal effects of the voting results, the referendum is both a citizens' democratic political right and a weapon of legitimacy for political and legal action.

In Costa Rica, a referendum can be both organized at the Municipal local level, as discussed above, and at the national level as well. The subject-matter of a referendum vote, at the national level, can be either a constitutional amendment or a proposed bill of parliament. At every level, and depending on the referendum subject, the referendum's own specific set of rules will govern it. At the national level, it is the Law on Referendum, together with articles 105, 129 and 195 of the Constitution, which apply. These recent reforms have been avowedly inspired by foreign legislations and practice; among those Switzerland's and Italy's come out top.

The concept of referendum as used in the Constitution is linked to the idea of sovereignty too. In Costa Rica, a democratic and representative regime¹⁶, the sovereign power is said to reside, exclusively on the Nation, which in turn delegates it to its freely elected appointees.

Subject of the Referendum

The people entrust the power to enact laws or legislative authority to the *Asamblea Legislativa* (the Costa Rican parliament). However, what the people give they can take back, as the saying goes, since this power cannot be refused or waived. In view of that, the 2003 constitutional amendment to Article 105 explicitly acknowledges that the people can also, through the referendum, exercise this legislative power. To be precise, the constitutional provision talks about the power of approving or annulling laws, and moreover states that this procedure may also be used to vote partial amendments to the Constitution. Consequently, a complete reform of the Constitution would not be subject to referendum. This is confirmed by Article 196 of the Constitution, which regulates general reforms, as it is confined to the Constituting Assembly option and qualified majority approval by Parliament; while Article 195, on partial amendments, does explicitly include the referendum as a valid procedural possibility.

Modalities

A determined number of citizens can legitimately request the referendum; in which case it is called a 'citizen referendum'; but either a two thirds vote from parliament, or the government, with a simple parliament majority, can also set it up. In this last event, the law speaks of legislative referendum and referendum by governmental request¹⁷. The appellation of the parliamentary referendum as "legislative" is confusing, because, although the subject referendi could be a "project of law" it could also be an amendment to a constitutional provision. In fact, the adjective, as used

¹⁶ See Art. 2, 9, and 105 of the Constitution.

¹⁷ See Section II of the Law on referendum, and particularly art. 12 and 13.

here, is to qualify the body who is demanding that the bill of law or amendment be submitted to consultation in the form of a referendum, which as stated before is the *Asamblea Legislativa*, not the referendum itself. Furthermore, the initiative to hold a referendum, when the people do not directly request it, will always involve participation by the people's representatives in parliament, for it cannot be summoned by government on its own accord alone. This works as a safety measure to guarantee this instrument's legitimate use.

With respect to 'citizen referendum', the rule included in the Constitution demands that the referendum be requested by at least 5% of "citizens registered on the electoral roll". The roll is constantly kept updated by the Electoral Tribunal. This rule has been widely criticized, even by its own proponents. The set percentage is too high to allow for the mechanism's effective use and also deters citizens from participating in law making. Additionally, the provision states the minimal threshold as a percentage of the electoral roll. As the roll is constantly changing and increasing in volume of registered voters, it adds a great deal of uncertainty to the rule. For example; in this year alone, the percentage reflects an approximate 132,000 people up from an estimate of 129,000 people at the beginning of 2006. Considering that the law provides for a 9 month term to collect the needed signatures, then the required number, in the case of a referendum petition which started collecting signatures at the start of the year and filed the completed signature forms in September, is open to question. Neither the Constitution nor the law on referendum give an answer. Our opinion is that the first step in the citizen referendum process, the official publication of the request to collect signatures, must define the number of signatures required as being 5% of the electoral roll at the time the request is filed. However, it would have made not only more sense, but also would have been easier and more practical had the law required a definitive number of valid signatures instead; which in Costa Rica, could have been 50 or 100 thousand.

Restricted Domains and other Limitations

The Constitution reserves a list of matters entirely to parliamentary procedure; however, it excepts applying the referenda to projects relating to: budget; taxes; monetary and credit; pensions; security; approval of state loans and contracts; or other administrative acts.¹⁸ The listed items cover a wide range of State action, leaving out of the referendum's scope certain "sensitive" subjects over which –it is still considered- citizens do not have the maturity or sufficient knowledge to vote on. However, an inventory which recurs to such undetermined and obscure terms as "security" or "acts of administrative nature" will undoubtedly need interpretation by the Electoral Tribunal, which, in our opinion, must be a restrictive one so as to allow for maximum scope of the referendum's application.

¹⁸ Article 105.3 of the Constitution: "*El referéndum no procederá si los proyectos son relativos a materia presupuestaria, tributaria, fiscal, monetaria, crediticia, de pensiones, seguridad, aprobación de empréstitos y contratos o actos de naturaleza administrativa*". It is interesting to note that the Law on referéndum introduces a slight grammatical difference in the transcription of this list in its own art 2, as it reads: "...*aprobación de empréstitos y contratos, ni actos de naturaleza administrative*" which could eventually lead to different and even conflicting interpretations.

Another unavoidable limit is rooted in Article 2 of the Law on Referendum. This provision states that no more than one referendum may be held each year. Moreover, no referendum may be scheduled during the six months prior to or after presidential elections. Article 2 imposes two extremely restrictive term conditions for the conduct of a referendum. The first restriction is there for purely practical financial reasons, as the organization of a referendum at the national scale represents a huge expense for a still developing nation such as Costa Rica. The second one has to do with the need to differentiate between the election of the head of State, who will be appointed for a four years term, and a referendum on a current determined issue being submitted to voters, i.e. to assure that all the issues at stake in a presidential campaign for election receive a wide coverage and that the coverage cannot be narrowed to a single issue as in a referendum; and to prevent electors from allowing their preferred political adherence to interfere with an impartial judgement that should prevail when voting in a referendum. The restriction also attempts to prevent the referendum from becoming a purely political and electoral instrument. However, in practice, this means that a maximum of three referenda may be held per presidential term, and this restriction minimizes the opportunities for public participation. It also unintentionally allows the government to manipulate the issues to bring to referendum.¹⁹ For example, the government can choose to summon a referendum on issues it deems of importance to its policy through the so-called “executive” referendum, with the aim of preventing the people from requesting a referendum on matters wherein citizens’ interests collide with those of government.

Procedure

The procedural aspects of referenda, whether constitutional or legal, of citizen initiative, or of “legislative” or “executive” origin, are entirely regulated in the *Ley sobre Regulación del Referéndum*, Law number 8492, or simply the Law on Referendum. The Law first explains the procedural differences in what we may call the pre-referendum stages; i.e. the process leading to the summons of the official referendum. Once the prerequisites are all met, for instance collecting the required number of signatures for the citizen referendum, the proper referendum procedure will commence²⁰. A notice of referendum will first be filed to the Electoral Tribunal, together with the bill of law or proposed amendment, and then published in the Official Journal, *La Gaceta*. It must include the project details and the date on which the referendum will take place. This formal communication will also include the drafted questions to which the voters can check the “yes” or “no” answers. The referendum must be held on a Sunday, within the ninety days following publication of the official notice. The Electoral Code expressly contains all the regulations for national elections including voting procedure and counting of votes and any other practical aspects on how to conduct the referendum.

Results

¹⁹ Roca Petitjean, citing Sartori, explicitly refers to this point in page 7 of his referenced work and states: “*Es importante preguntarse quién establece los puntos que serán sometidos a referendo. La consulta referendaria casi siempre es convocada “desde arriba”, por el poder político, aunque toda legislación establece formas en la que el derecho es utilizado por los ciudadanos*”.

²⁰ Ibid. Articles 16ss.

The Electoral Tribunal has two weeks from the referendum date to count the votes and officially declare the results of the referendum. The results are immediately notified to parliament. Then, provided a minimum 30% of registered voters participate in the referendum the results become binding, and any laws adopted by referendum become obligatory in accordance with the Constitution and the Law on referendum.,. If the referendum relates to either a proposed amendment to the Constitution or a legislative matter that ordinarily requires a qualified majority, this participation threshold raises to a minimum of 40% of the electorate.

Publicising the Question Submitted to Referendum

It is fundamental for the referendum to be effectively democratic that both the text submitted to vote and the question to be asked, are given adequate publicity and diffusion. However, this entails significant expense on the government's budget, added to those associated with the organization of the referendum *per se*. Parliament's research institute warned of this contingency and clearly outlined in relation to the referendum that "governmental expenses may increase due to the cost implicated in maintaining a fully informed public".²¹ The Electoral Tribunal was nonetheless commissioned by the Law to ensure publicity to both the referendum notice and its text via official media "*to the extent of its possibilities*"; meaning through radio and television stations; and in local as well as national newspapers²².

Whatever the case, the referendum Law regulates further on all public or private campaigning in relation to the issues to be voted on by referendum; it specifically prohibits any public entity from using its budget for campaigning either in favour or against the subject of the referendum. Foreigners cannot participate in the referendum in any of its stages; they can neither vote, nor collect signatures, or donate to the campaign. Hence, only Costa Rican citizens may "contribute" to the "yes" or the "no" campaign. Even then, however, contributions must not exceed €3.000 (approximately). It is obvious that these rules on both publicity and campaigning are designed to deter any interference from either the government, non-Costa Ricans, financially powerful individuals or interest groups in order to preserve the transparency of the ideas being debated upon, thus decreasing the risk of influencing public opinion.

Legislative and Constitutional Iniciativa Popular

The Iniciativa Popular Office

²¹ CEDIL, Referendum and Plebiscite, pg. 3.

²² Article 19 of the Law on Referendum: "*Artículo 19.—Difusión del texto sometido a referéndum. El aviso de convocatoria al referéndum y su texto serán publicados en La Gaceta por el TSE, que podrá difundir, además, en la medida de sus posibilidades, una síntesis del texto, por medio de las estaciones de televisión y radio nacionales y regionales y los periódicos de circulación nacional y regional.*"

Before the *Iniciativa Popular* mechanism was adopted into the Constitutional framework of Costa Rica as a true direct democracy procedure a first, less finite, attempt to grant citizens the initiative on legislation had been implemented through the creation of the *Oficina de Iniciativa Popular*, a specialized body of parliament. From June 1998, this Office has worked as an “*effective instrument of social active participation, by means of which any person (and not just those over 18) may learn, get to know, give their opinion, pronounce themselves and propose ideas in the law forming process with the certainty that their proposals will reach the members of parliament*”.²³ Indeed, the Office’s main tasks have developed in two directions: first, as an information office functioning as link between parliament and the people; and second, as the agency in charge of receiving and channelling citizens’ expectations and opinions, and then transmitting these to the citizens’ representatives. In fact, the results of these objectives may be assessed as poor, taking into account that in its 8 years of existence it has only received about 550 “initiatives”, most of which are in fact opinions, comments, suggestions, and complaints, from which less than 10% have caught the attention of parliament and made their way into the legislative flow, and only 5% became a new Costa Rica law.

With the new law, *Iniciativa Popular*, having entered into force the Office is commanded with the additional, and potentially more important responsibility for providing technical support and advice at no charge on the drafting of proposals, as well as on the procedures that must be followed by citizens interested in exercising their right of *Iniciativa Popular*.²⁴

The Popular Initiative in the Constitution

The 2003 package reform introduced, together with the referendum, the well known instrument of direct democracy called the *iniciativa popular*, whereby a predetermined number of citizens, (5% of the electorate), may initiate the law making process by filing a drafted or formulated bill or proposal for a partial constitutional amendment, with parliament. Although the relevant provision of the Constitution, Article 123, only barely develops this mechanism of public participation, it does set a list of topics on what may not be addressed in the proposed initiative. This inventory of prohibited subjects is essentially the same found with respect to the referendum, even though such restrictions are meaningless in the case of *Iniciativa Popular*, for reasons brought up below.

Since the list in Article 123 is exhaustive, it may be interesting to note that some sensitive topics, such as migration and foreigners or criminal law, could be presented as *Iniciativas Populares*, as long as they do not conflict with human rights principles.

A weakened *Iniciativa Popular*

In Costa Rica, a *Iniciativa Popular* does not automatically and imperatively end in a vote by the citizens. Instead, the Implementation Law, which came to being early in

²³ Urbina, Sandra, head coordinator of the Popular Initiative Office, article published in “La República”, September 2006.

²⁴ Article 7 of the Law of Popular Initiative.

2006 under the name *Ley de iniciativa popular*, number 8491, interprets that the constitutional norm requests that the initiative be voted upon as a requirement; but this obligation refers to an ordinary vote by parliament, and not a vote by the citizens themselves through a complementary referendum.²⁵ As a group of congressmen stated in 2003, the *Iniciativa Popular* as a direct democratic instrument, “finds specific justification, particularly in those systems which automatically submit the proposed project of law, if it is not already accepted by parliament, to a referendum. Otherwise, it is easier to resort to parliamentary initiative, which is made by a single congressman and bears the same effects!”²⁶ This signifies that, at least in Costa Rica, it is simpler for a citizen to find the elected representative and have him or her file the initiative in parliament, than go through the whole process of signature collecting, for both initiatives have essentially the same force and effects, and will transit through the same complex procedure.

This interpretation obviously discourages citizens from using this participative instrument, as the final decision will still rely on law makers, who could simply choose to reject the proposal. Even if lawmakers favourably receive the proposal, arguably they could modify, amend and substantially alter the proposed draft, for nowhere is it stated that the initiative must be voted on in the condition it was filed. This is confirmed by the fact that the law on *Iniciativa Popular* provides that the initiative will follow the ordinary legislative procedures, and is subject to both first and second debate in plenary sessions.

Moreover, all remaining interest that the citizens may have in using the *iniciativa popular* is definitely impaired by the high percentage of signatures needed to back up and validate the initiative, which is currently 5% of registered voters. Realistically, we cannot expect anybody to expend valuable resources to obtain more than a hundred thousand signatures for filing a bill, even a constitutional amendment proposal, when the same results may be achieved through considerably less effort, particularly when the final outcome of the initiative depends on parliament alone.

Of note, there is currently a proposed amendment hidden in the parliament's drawers, which seeks to lower the required percentage necessary for filing an initiative from 5% to 1.5% of the Electoral Roll, (this translates currently to approximately forty thousand people).²⁷

5. Perspectives of e-Democracy in Costa Rica

Use of technology has spread to the point that Costa Rica is now one of the few Latin American Nations with wide internet diffusion. Although there is an identifiable gap between the periphery and centre, not only to access but also to technical knowledge, one can speak in Costa Rica of a "democratization" of internet and IT

²⁵ Article 6 *ibid*.

²⁶ Bill to amend articles 105, 123, 129 and 195 of the Constitution, file number 14776. Interestingly, this proposal comes from the same proponents as the original law.

²⁷ *Ibid*.

access. This has led to governmental agencies exhibiting greater interest in using this technological tool for all kinds of purposes; such as: internal communications; efficiency; rapid response; public information; etc. From anybody's laptop via the internet public services can now be requested and public information easily accessed. The current government has played a particularly active role in modernizing and "digitalizing" the public sector; although, during the last presidential election campaign internet was also a widely employed medium of communication for political parties as they were able to make proposals and political guidelines available to anybody.

The Electoral Tribunal, also, has shown a proactive position specifically in regard to the use of new technologies in electoral processes. The effort has been targeted towards information and transparency of the electoral process, with a continuously updated portal on line which, during the last presidential election, made available the scrutiny results of an almost perfect tied election thus giving security and certainty to the electorate that the votes were been respected.

But the role of the Electoral Tribunal has gone further still. A Sub-commission on e-voting was created with the mandate to put in place a prototype plan that has been worked upon since early 2000 for implementing electronic voting.²⁸ A preliminary and small scale test was carried out during the December 2002 mayoral elections when an e-voting system was set up inside the voting booths, alongside the old –and current- paper vote, providing the voters with an alternate method to use if they so preferred. On that occasion, the pilot plan was on trial in 133 voting centres throughout the Country. Unfortunately, four years have since passed and with the next mayoral election just around the corner there is still no official plan to perform any new "test" of the presumably improved system, thereby denying the e-voting option to electors. In a recent newspaper article, it was suggested that the computer equipment of the all public schools throughout the Country, which already serve as voting centres, be adapted and used for e-voting, in order to make electoral processes less costly. This simple but brilliant initiative has found no positive echo in the halls of the Electoral Tribunal, even though we agree that this would eventually be an effective solution to palliate one of the biggest handicaps of direct democracy for developing Nations: the high expenses involved in the consultation process.

In addition, we can regret that no reference to e-voting was introduced as part of the new Law on Referendum provisions. To us, this is a disappointing drawback from the inspiring efforts of the 2002 project. Plus, referendum would have been a great opportunity, due to the simplicity of the answer that voters must provide –yes or no- to "educate" the people on the use of these technologies applied to citizen democratic participation procedures.

However, civil society has been making a democratic use of information technologies, and especially of internet (emails, virtual polls on political issues, discussion boards, virtual registration to political organizations) in a way which has helped the flow of ideas, created public awareness on certain issues of national interest and allowed for greater participation by, at least, part of the Costa Rican citizenry. Eventually, we may predict, such means of information and communication

²⁸ Cf. Electoral Tribunal minutes of session 87-2002.

will serve as perhaps the more important instrument to collect signatures, diffuse arguments and campaign once the referendum is effectively absorbed by the Costa Rican political system.

6. Conclusions

Costa Rica is a democratic Nation. It is the most democratic Central American Country. It is also one of the most outstanding democracies in Latin America. Its evolution from pure representative to participative (as it has consensually been called in our political environment) has been measured. Like a good wine, it is the product of a maturing process which has allowed it to gain new aromas and flavours: direct democratic instruments. This rich wine has only recently been decanted, and is now ready to be enjoyed, yet remains to be tasted.

As two Acts on direct democracy procedures at the national level were passed only earlier this year (2006), citizens have not yet had time to truly apprehend the extraordinary change in their political rights. Additionally, the government has made no effort to adequately inform the people of these powerful instruments they may now recur to, to make their voices heard. The fact that these instruments have not yet been tested, either at the lower municipal level or the national level, makes it difficult to assess their appropriateness. Notwithstanding, certain organized groups have already made official their intention to collect signatures, in order to petition a referendum on whether to ratify the Free Trade Agreement signed two years ago with the United States of America.

On this issue, the ongoing debate is boiling. It has been suggested that the past presidential elections could be translated as an opinion thermometer between those who were in favour of approving this International Agreement, and those opposing it; reading an almost perfect 50% on each side. Any referendum on this subject could nevertheless only serve as a consultative tool, as it can have no binding effect; the referendum cannot relate to an international treaty, but only to internal laws and constitutional amendments. It would be true that the results of this referendum would legitimatise Parliament's final decision; and, most importantly, could serve as a steam escape valve for the existing heated tensions which, as some extremist labour union leaders have threatened, could eventually lead to violent street protests.

The true challenge for Costa Rica is to make these instruments widely known, and accustom people to their having been granted this opportunity to directly define both their own and their country's future. And so, quoting a recent major Costa Rican newspaper editorial *"let it be in the voting booths of the referendum where the destiny of the Free Trade Agreement is decided, and not in the "referendum" of street blockages and violence"*.²⁹

And therein lays the virtue of institutionalized democratic participation procedures like the referendum, which can strengthen and support both the country's stability and the democratic regime; while completing the representative system in which many of the

²⁹ Madrigal Castro, Álvaro, La República, June 8th 2006.

Costa Rican people still have faith. For then, Costa Rica will have truly earned both its worldwide respect and the nickname “the Switzerland of Central America”.

San José, Costa Rica, October the 17th of 2006.

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Anexes

Annex i) Direct Democratic Instruments at the Local Level.

